Latif bin Che Ngah & Anor v Maimunah bte Zakaria

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12–30 OF 1999
NIK HASHIM J
24 AUGUST 2002

Damages (Personal Injury or Death) *— Fatal accident — Loss of dependency — Housewife and six children — Whether the deceased's income should be supported by documentary evidence — Whether total sum awarded should be subjected to a further cut of $^1/_3$ for contingencies*

This is the appellants' appeal against the quantum of damages only from the judgment of the sessions court judge in a road accident in which the respondent, a housewife with six children, had lost her 33 year old husband, upon whom they were dependants for support. The respondent's claim was for loss of dependency pursuant to s 7 of the Civil Law Act 1956 ('the Act'). The learned sessions court judge awarded the respondent damages for loss of support based on a multiplicand of RM1,500 per month with a multiplier of 11. The appellants appealed against the award contending that the deceased's income was not supported by any documentary evidence and that the total sum awarded should be subjected to a further cut of $^1/_3$ for contingencies.

Held, dismissing the appeal with costs:

(1) In the circumstances of this case, though the deceased's income was not substantiated, the court still found the amount of RM1,500 per month as loss of support to the deceased's wife and six children as fair and reasonable. There was no basis for the appellants' fear that the respondent could have exaggerated the amount. The learned judge, who heard and saw the respondent, obviously had accepted the evidence of the respondent and had taken into consideration the fact that she had six children to support, in awarding the amount. The award was justifiable in the circumstances (see p 271A–C).

(2) The obvious difference between *Chan Chin Ming* and the claimant in this case was that under *Chan Chin Ming*, the claimant was the deceased's mother whereas the claimant in the case under consideration was the deceased's widow. Therefore, since *Chan Chin Ming* can be distinguished from the present case, the ratio decidendi pertaining to the number of years' purchase in *Chan Chin Ming* did not apply to the present case (see p 275A–B); *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233 distinguished.

(3) Accordingly, for the purpose of the present case and following the later decision of the Court of Appeal in *Ng Soo Ang*, the court held that the learned judge of the sessions court made no error of law when he relied on the Supreme Court case of *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 for the interpretation

of s 7(3)(iv)(d) of the Act as the authority for not allowing a further cut of $^1/_3$ from a total sum of RM198,000 which he awarded for loss of dependency based on the multiplier of 11 years' purchase and the multiplicand of RM1,500 per month (see p 275F–G); *Ng Soo Ang v Chai Chuan Seng* (Rayuan Sivil No P–04–18 tahun 1998) followed.

[Bahasa Malaysia summary

Ini adalah rayuan perayu-perayu terhadap kuantum ganti rugi daripada penghakiman hakim mahkamah sesyen dalam satu kemalangan jalanraya di mana responden, seorang surirumah dan mempunyai enam orang anak, telah kehilangan suami beliau berusia 33 tahun, tempat mereka sekeluarga bergantung untuk sara hidup. Tuntutan responden adalah untuk kehilangan penanggung menurut s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut'). Hakim mahkamah sesyen yang bijaksana telah mengawardkan kepada responden ganti rugi untuk kehilangan penyara berdasarkan satu angka yang didarab sebanyak RM1,500 sebulan dengan pengganda 11. Perayu-perayu telah membuat rayuan terhadap award tersebut dengan menegaskan bahawa pendapatan si mati tidak disokong oleh apa-apa keterangan dokumentari dan bahawa jumlah keseluruhan yang diawardkan hendaklah tertakluk kepada satu potongan tambahan sebanyak $^1/_3$ untuk kontingensi.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Dalam keadaan kes ini, walaupun pendapatan si mati tidak disahkan, mahkamah masih mendapati bahawa jumlah RM1,500 sebulan yang diawardkan sebagai kehilangan tanggungan kepada isteri si mati dan enam orang anaknya adalah adil dan munasabah. Tiada asas untuk perayu-perayu berasa bimbang bahawa responden mungkin telah menokok-tambah jumlah tersebut. Hakim yang bijaksana, yang mendengar dan melihat responden, dengan nyata telah menerima keterangan responden dan telah mempertimbangkan hakikat bahawa beliau mempunyai enam orang anak untuk ditanggung, semasa jumlah tersebut diawardkan. Award tersebut telah dijustifikasikan dalam keadaan sedemikian (lihat ms 271A–C).

(2) Perbezaan ketara antara *Chan Chin Ming* dan penuntut dalam kes ini adalah dalam *Chan Chin Ming*, penuntut adalah ibu si mati manakala penuntut dalam kes yang sedang dipertimbangkan adalah balu si mati. Oleh itu, memandangkan *Chan Chin Ming* boleh dibezakan dengan kes semasa, ratio decidendi berkaitan jumlah tahun belian *Chan Chin Ming* tidak terpakai dalam kes ini (lihat ms 275A–B); *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233 dibeza.

(3) Sewajarnya, bagi tujuan kes semasa dan mengikuti keputusan Mahkamah Rayuan dalam *Ng Soo Ang*, mahkamah memutuskan

bahawa hakim yang bijaksana dalam mahkamah sesyen tidak terkhilaf di sisi undang-undang apabila beliau bergantung kepada kes Mahkamah Agong *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 untuk tafsiran s 7(3)(iv)(d) Akta tersebut sebagai autoriti agar tidak membenarkan potongan tambahan sebanyak $^{1}/_{3}$ daripada keseluruhan jumlah RM198,000 yang beliau telah awardkan untuk kehilangan penanggung berdasarkan pengganda 11 tahun belian dan angka yang didarab sebanyak RM1,500 sebulan (lihat ms 275F–G); *Ng Soo Ang v Chai Chuan Seng* (Rayuan Sivil No P–04–18 tahun 1998) diikut.]

Notes

For cases on loss of dependency, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 336–338.

Cases referred to

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (distd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)
Ng Soo Ang v Chai Chuan Seng (Rayuan Sivil No P–04–18 Tahun 1998) (folld)
Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (refd)

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(d)
Pensions Act 1980

M Kumar (*T Raja & Co*) for the appellants.
Americk Sidhu (*GTS & Americk Sidhu*) for the respondent.

Nik Hashim J:

The appeal

This is the appellants' appeal against the quantum of damages only from the judgment of the Sessions Court, Kuala Terengganu in a road accident case which took place on 17 April 1997, in which the respondent, a housewife with six children, had lost her 33 year old husband, upon whom they were dependants for support The respondent's claim was for loss of dependency pursuant to s 7 of the Civil Law Act 1956 ('the Act').

By an order of 22 August 1999, the learned judge of the sessions court after the hearing gave judgment against the appellants and made the following awards in favour of the respondent, namely:

(i)	Bereavement	... ...	RM10,000
(ii)	Burial costs	... ...	RM2,000
(iii)	Cost of documents	... ...	RM50

A

(iv) Loss of support ... ... RM1,500 x 11 years

(28 months for pretrial and 104 months for post trial = RM198,000)

(v) Interest for special damages at 4%pa from date of accident up to the date of the judgment.

B

(vi) Interest for general damages at 8%pa from date of summons up to the date of the judgment.

(vii) Costs of this action.

C The appeal before this court pertains to the loss of support and the interests for post trial dependency.

Contentions of the parties

D Before me, learned counsel for the appellants, Mr M Kumar, complained that there was no evidence to show the deceased's income and therefore, the learned trial judge erred when he accepted the evidence of the respondent outright without other supporting evidence. However, for the multiplicand, he suggested RM1,000 per month for 11 years as being reasonable for loss of support and a further $^1/_3$ deduction against the total award for contingencies, other vicissitudes of life and accelerated payment and quoted the Court of E Appeal case of *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 and the Supreme Court case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 in support of his argument.

Learned counsel for the respondent, Mr Americk Sidhu, on the other hand, contended that the award of RM1,500 per month for loss of support F was reasonable as it was awarded based on the evidence led in court, and as such it should not be disturbed. With regard to the multiplier, learned counsel submitted that the multiplier of 11 years was correct and in support he cited *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99, a Supreme Court case.

G *Multiplicand*

With regard to the deceased's earning in Singapore, the learned judge in his grounds of decision at p 243 of the appeal record said:

> Mengenai pendapatan si mati, saya menerima penghujahan peguam plaintif bahawa pendapatannya adalah sebanyak RM4,000 sebulan walaupun tidak H disokong oleh apa-apa keterangan dokumentari. SD1 (first appellant) di dalam keterangannya juga telah mengesahkan bahawa si mati telah bekerja di Singapura kerana beliau memang kenal dengan si mati.

And in accepting the respondent's evidence regarding the amount of RM1,500 per month that the deceased husband gave her, the learned judge I at p 244 said:

> Saya juga menerima keterangan SP2 (the respondent) bahawa pemberian sebanyak RM1,500 oleh suaminya sebulan kerana jumlah ini adalah

munasabah memandangkan si mati mempunyai enam orang anak sebelum kematiannya ... .

In my judgment, the learned judge was right when he accepted the evidence of the respondent and awarded a sum of RM1,500 per month as loss of support to the deceased's widow and six children based on the evidence adduced in court. The respondent's ('SP2's') evidence was clear and this is what she said at p 34:

Sebelum kemalangan, suami saya bekerja sebagai tukang plaster di Singapura. Dia telah bekerja di Singapura selama lima tahun sebelum kemalangan ini. Gajinya ialah sebanyak RM4,000 sebulan. Suami saya telah memberi sebanyak RM2,000 sebulan kepada saya. Suami saya balik dua bulan sekali. Dia telah memberi kepada saya sebanyak RM3,000 untuk dua bulan. Suami saya telah memberi kepada saya RM1,500 sebulan. Baki pendapatan suami saya telah disimpan olehnya untuk kegunaannya. Saya tidak tahu siapakah majikan suami saya di Singapura. Makan minum dan tempat tinggal di Singapura adalah tanggungan suami saya sendiri. Suami saya tidak memberitahu saya dia tukang plaster di bangunan mana.

Her explanation that she did not know about her deceased husband's employer in Singapore as she was not told by her husband, was reasonable, for the deceased did not expect to die on that fateful day. If he had, then perhaps he may have told his wife the name and address of his employer in Singapore. That explains for the absence of the documentary proof of the deceased's income in this case.

Further, the first appellant ('SD1') admitted he knew that the deceased was working in Singapore when he, under cross-examination at p 45 said:

Saya kenal dengan arwah si mati. Dia tinggal sekampung dengan saya. Saya juga kenal dengan isteri si mati. Si mati bekerja di Singapura.

With regard to the deceased's earnings, the learned counsel for the appellants, in cross-examination of the respondent ('SP2') on 12 January 1999, put to the respondent that her husband's income was S$35–40 per day. The respondent's answer at p 35 said:

Saya tidak bersetuju gaji suami saya adalah S$35–40 sehari.

Thus, from the evidence, it is manifestly clear that the deceased was working and earning a living as a plasterer in Singapore for five years before the accident. S$35–40 at 1997 rates would have translated into RM80–92 per day at an exchange rate of RM2.30 to S$1. Assuming the deceased worked only 25 days per month, excluding working overtime, the appellants' evidence disclosed a monthly income of RM2,000 to RM2,300, out of which the learned judge awarded a sum of RM1,500 as loss of support to the respondent and six children. In this regard, I do not think the learned judge erred in his award. With respect, I agree with the learned counsel for the respondent that it is not sufficient to say that the respondent would not need so much money a month just because she lives in a little kampung in Besut, Terengganu. It was common knowledge then that people from Kelantan and Terengganu went to work in Singapore for good money. I take judicial notice that the wages there were substantially higher

A than those in Malaysia. It is therefore obvious that the reason for the respondent's deceased husband chose to work away from his family in a foreign country was to improve his standard of living and the standard of living of his family.

In the circumstances of this case, though the deceased's income of
B RM4,000 per month was not substantiated, I still find the amount of RM1,500 per month as loss of support to the deceased's widow and the six children fair and reasonable. There was no basis for the appellant's fear that the respondent could have exaggerated the amount. The learned judge, who heard and saw the respondent, obviously had accepted the evidence of the respondent and had taken into consideration the fact that she had six
C children to support, in awarding the amount. In my view, the award was justifiable in the circumstances.

Multiplier

Learned counsel for the appellants conceded that the multiplier in the case
D of the deceased who was 33 years old at the time of the fatal accident is 11 years based on the statutory formula: 55 - 33 divide by two = 11 years, but he wanted a further cut of $^1/_3$ against the total award for contingencies based on the authorities he earlier cited. Learned counsel for the respondent objected to the further cut.

E In order to resolve the rival contentions, perhaps the following cases need to be considered.

In *Marappan*, the Supreme Court comprising Hashim Yeop A Sani CJ (Malaya), Harun Hashim and Gunn Chit Tuan SCJJ, had at p 101 decided:

> The legislature has made its intention very clear by using mandatory language
F in s 28A(2)(d) of the Act [Civil Law Act 1956] that 'in assessing damages for loss of future earnings the court shall take into account that in the case of a person who was of the age of thirty years, or below at the time when he was injured, the number of years' purchase shall be 16'.

It is pertinent to note that s 28A(2)(d) is in pari materia with s 7(3)(iv)(d) of the Act with regard to the number of years' purchase. So, whatever
G interpretation accorded to s 28A(2)(d) must, on the basis of consistency, be applied to s 7(3)(iv)(d) of the Act. Thus, by using a mandatory term 'shall' in s 7(3)(iv)(d) of the Act and if *Marappan* is followed, then, in assessing the loss of earnings in respect of any period after the death of a person, the court has no discretion to alter that fixed statutory multiplier of 16 years' purchase in respect of a person who was of the age of 30 years or below at the time of
H his death.

It is true that the issue of further deduction for contingencies, other vicissitudes of life and accelerated payment was not raised in *Marappan*, and therefore the Supreme Court there did not have the opportunity to decide on the issue.

I Then came *Chan Chin Ming*. In *Chan Chin Ming*, the plaintiff, a 48 year old mother, claimed for loss of support as a result of a fatal accident in which her deceased unmarried 25 year old son was involved. His Lordship

Peh Swee Chin SCJ (delivering the majority judgment of the Supreme Court) ruled that the court still retains a discretion to reduce the number of years of purchase to a period less than 16 years to provide for contingencies, such as the probability of the deceased marrying had he not died. Thus, the Supreme Court reduced the 16 years' purchase decided by the High Court to seven years.

However, Edgar Joseph Jr SCJ in his powerful dissenting judgment at p 248 had this to say:

> I regret I have to part company with the majority of the members of this court and say that I cannot accede to the submission of counsel for the defendants regarding this part of the case as, to do so would be to fly in the face of the mandatory provisions of proviso (d) to s 7(3)(iv) of the Act, which fixes the multiplier at 16 years in cases such as the present.
>
> To my mind it is manifestly clear that in enacting the detailed provisions of proviso (d) to s 7(3)(iv), Parliament had intended to take away the discretion of the court to select the appropriate multiplier in assessing loss of earnings of a deceased person in respect of any period after his death, for purposes of a claim for loss of support under s 7(1).

At p 250, his Lordship held:

> I, therefore, agree with the trial judge that contingencies such as the probability of the deceased marrying had he not died in the accident and, as a result, his contributions for the support of his mother ceasing or being considerably reduced, 'have been built into the statutory formula of 16 years', and that, therefore, he was bound to adopt that statutory formula since the deceased was 25 years of age at the time of his death.

And further down, his Lordship concluded at p 250:

> ... If the court has no discretion to alter the statutory multiplier of 16 years' purchase ... then equally, it cannot do so indirectly, by reducing the multiplicand ... .

The majority decision in *Chan Chin Ming* was followed by the Court of Appeal in *Takong Tabari*. In these two cases, however, *Marappan* was not referred to.

In *Takong Tabari*, the Court of Appeal following *Chan Chin Ming* held that the commom law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force as Parliament had not expressed its intention to depart from the general system of law. Under such circumstances, the trial judge made no error of law when he made the $^1/_3$ deduction.

Besides *Takong Tabari*, there is another Court of Appeal case on loss of support. Learned counsel for the respondent drew my attention to the recent case of *Ng Soo Ang v Chai Chuan Seng*, Mahkamah Rayuan, Rayuan Sivil No P–04–18 tahun 1998 where the court, comprising Mokhtar Sidin, Abdul Hamid Mohamad and Mohd Noor Ahmad JJCA, heard the appeal by housewife Ng Soo Ang on 17 January 2002 and the case was reported on the next day in the *New Straits Times*, against a High Court decision on 12 February 1998, which reduced Ng's award for loss of support to be paid

from 16 years to eight years as Ng had remarried by then. Ng, now 35, had sued businessman Chai Chuan Seng in the sessions court for an accident which caused her husband's death in Jalan Baru, Prai on 2 May 1990. The husband was 24 at the time of his death. The trial judge found that Chai was 100% liable for the accident and awarded Ng damages for loss of support to be paid for 16 years at RM750 per month. Chai later appealed against the decision to the High Court, which reduced the number of years' purchase to eight as Ng had remarried by then. The Court of Appeal was reported as saying that when a widow remarried, it should not affect the amount awarded by the courts for loss of support. The court noted that even the government encouraged widows to remarry by amending the Pensions Act 1980, which allowed widows to continue getting their deceased husbands' pension payments. Therefore, the court held that the question of re-marriage should not be deemed as good consideration for the courts to reduce the quantum for loss of support for women whose husbands died before reaching 30. Thus, the Court of Appeal ruled that the High Court judge was wrong in reducing the number of years of purchase for loss of support of her deceased 24 year old husband from 16 to eight years and reinstated the number of years' purchase to 16. The order of the court is now reproduced in full:

DALAM MAHKAMAH RAYUAN MALAYSIA
BERSIDANG DI PULAU PINANG
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO P–04–18 TAHUN 1998

Antara

NG SOO ANG (Isteri kepada LOW BOON HAI si mati sebagai dependan) ... Perayu

Dan

CHAI CHUAN SENG ... Responden

Dan

NG SOO ANG (Sebagai Pentadbir Harta Pusaka LOW BOON HAI) ... Pihak Ketiga

(Dalam Mahkamah Tinggi Pulau Pinang melalui Rayuan Sivil No 12–87–96)

Antara

NG SOO ANG (Isteri kepada LOW BOON HAI si mati sebagai dependan ... Perayu

Dan

CHAI CHUAN SENG ... Responden

Dan

NG SOO ANG (Sebagai Pentadbir Harta Pusaka) LOW BOON HAI ... Pihak Ketiga

Dalam Mahkamah Sesyen Butterworth Melalui Kes Sivil No 53–287–95)

Antara

NG SOO ANG (Isteri kepada LOW BOON HAI si mati sebagai dependan) ... Plaintif

Dan

CHAI CHUAN SENG ... Defendan

Dan

NG SOO ANG (Sebagai Pentadbir Harta Pusaka LOW BOON HAI) ... Pihak Ketiga

KORAM

YANG ARIF DATUK HAJI MOKHTAR BIN HAJI SIDIN HMR .
YANG ARIF DATO' ABDUL HAMID BIN HAJI MOHAMAD HMR.
YANG ARIF DATUK WIRA HAJI MOHD NOOR BIN HAJI AHMAD HMR.

DALAM MAHKAMAH TERBUKA
PADA 17 JANUARI 2002

PERINTAH

RAYUAN INI ditetapkan untuk perbicaraan pada hari ini dalam kehadiran Encik Baldev Bhar (bersama Encik DP Rajah), peguam bagi pihak perayu dan Encik Veerasamy Rajendran peguam bagi pihak responden DAN SETELAH MEMBACA Rekod Rayuan yang telah difailkan DAN SETELAH MENDENGAR hujah peguam-peguam tersebut ADALAH DIPERINTAHKAN bahawa:

(1) rayuan dibenarkan;

(2) multiplier dari lapan tahun dipinda ke 16 tahun dan multiplicand yang telah diawardkan untuk sejumlah RM750 sebulan dikekalkan;

(3) kos rayuan di Mahkamah Rayuan diawardkan sejumlah RM500 dibayar oleh responden kepada perayu;

(4) kos rayuan dan kos rayuan balas di Mahkamah Tinggi Pulau Pinang kepada perayu; dan

(5) wang deposit yang dibayar oleh perayu dikembalikan.

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 17 Januari 2002.

tt
HASNAH DATO' MOHAMMED HASHIM
.....
PENDAFTAR
MAHKAMAH RAYUAN MALAYSIA
KUALA LUMPUR

Now I have to consider whether there is any, and if so, what material difference between the claimant in *Chan Chin Ming* and the claimant in the

present case. The obvious difference between the two claimants which I consider to be most material, is this: under *Chan Chin Ming*, the claimant was the deceased's parent mother whereas in the case under consideration, the claimant was the deceased's widow. Therefore, since *Chan Chin Ming* is readily distinguishable from the present case, the ratio decidendi pertaining to the number of years' purchase in respect of a claim for loss of support of a deceased unmarried child by a parent as stated in *Chan Chin Mingg*, in my view, does not apply to the present case which is a claim for loss of support by a spouse and her six children. I therefore, with respect, agree with the submission of learned counsel for the respondent that *Chan Chin Ming* has no relevance to this case.

In fact, from a close scrutiny of *Chan Chin Ming*, it is interesting to note that his Lordship Peh Swee Chin SCJ has drawn a very clear distinction between a dependency claim by a spouse and children and a claim by a parent, when he, at p 243 said:

> Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor-made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before and after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings, which would have been earned had the deceased lived.
>
> On the other hand, the state of the general system of law relating to *a parent's claim as a dependant for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either cease or be reduced considerably on the almost invariable contingency of subsequent marriage of such unmarried child.* If the learned judge was right, it would mean that this aspect of the law was swept away or changed.
> (Emphasis is added.)

Thus, it is clear from the above passages that the whole decision in *Chan Chin Ming* relates to a claim by a parent. A claim by a spouse and children is not affected by the decision.

Accordingly, for the purpose of the present case and following the later decision of the Court of Appeal in *Ng Soo Ang*, I hold that the learned judge of the sessions court made no error of law when he relied on the Supreme Court case of *Marappan* for the interpretation of s 7(3)(iv)(d) of the Act as the authority for not allowing a further cut of $^1/_3$ from a total sum of RM198,000 which he awarded for loss of dependency based on the multiplier of 11 years' purchase and the multiplicand of RM1,500 per month.

With regard to the post trial dependency, I agree with the appellants that no interests be allowed and thus, the order of the learned judge allowing for such interest is varied accordingly.

To that extent, the appeal is dismissed with $^3/_4$ costs to the respondent.

Appeal dismissed with costs.

Reported by Zahid Taib